Nos. 91-1111 and 91-1128

In The

Supreme Court of the United States

October Term, 1992

HARTFORD FIRE INSURANCE CO., *et al.*,
AND
MERRETT UNDERWRITING AGENCY
MANAGEMENT LIMITED, *et al.*,

Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICI CURIAE OF SERVICE INDUSTRY COUNCIL AND CALIFORNIA STATE ELECTRONICS ASSOCIATION IN SUPPORT OF RESPONDENTS

RICHARD I. FINE
LAW OFFICES OF
RICHARD I. FINE & ASSOCIATES
A Professional Corporation
10100 Santa Monica Boulevard
Suite 1000
Los Angeles, California
90067-4090
(310) 277-5833

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RELATED PROVISIONS:

United States:

Other:

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICI CURIAE

The *amici* are associations which represent substantial sectors of the United States economy related to the businesses of servicing and maintaining appliances, computers, consumer and business electronic products, office equipment, and all related products sold to businesses and consumers in the United States.[1] Electronics associations and others in the same business have approximately 40,000 separate establishments with approximately three employees per establishment representing approximately 120,000 jobs.

The businesses carry commercial general liability insurance as well as other forms of insurance. This insurance is mandatory for the proper functioning of their businesses. During the last number of years, the businesses have paid and continue to pay increasingly higher premiums for their commercial general liability insurance.

Individuals who are owners and employees of the businesses as well as all other consumers have also been required to pay increasingly higher premiums for their personal insurance.

These individuals and other consumers have also been required to pay higher prices for all products due to the increases in commercial general liability insurance premiums.

---

[1] This Brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

A. Service Industry Council

The Service Industry Council ("SIC") is a coalition of national and state associations. These associations represent servicers for appliances, computers, consumer electronics products, home equipment, and office equipment.

B. California State Electronics Association

The California State Electronics Association ("CSEA") is a statewide trade association consisting of companies and individuals, who perform warranty and out-of-warranty service on appliances, business equipment, computers, commercial electronics products, and consumer electronics products.

SUMMARY OF ARGUMENT

The insurance business today is a massive worldwide enterprise of interlinked businesses and individuals whose decisions, wherever made, affect businesses and the lives of every person in every part of the world.

The United States insurance industry, at the end of 1991, had assets of more than $2.15 trillion. It had premiums of approximately $663.6 billion, and investment income of approximately $34.2 billion for a total income of approximately $697.8 billion ($.6978 trillion).

This is approximately 400% greater than the retail sales of new automobiles for the year 1990.

The United States insurance industry represents approximately 12% of the United States Gross Domestic

Product of approximately $5.522 trillion (1990) and approximately $5.677 trillion (1991). A comparison of the total premiums paid in 1991 to the latest reported figures of the number of businesses in the United States (6,107,413 in 1989), and the population of the United States (248,709,873 in 1990), shows that each business accounted for an average of $108,500.00, in premiums and each man, woman and child accounted for an average of $2,700.00 in premiums.

In the property/casualty category (excluding automobiles) of the United States insurance industry, the comparable figures are $601 billion in assets, approximately $223 billion in premiums, approximately $35,000.00 for each business, and approximately $900.00 for each man, woman and child.

The facts and allegations of the Complaints specifically allege boycott and coercive activity directed to the United States market and the corresponding effect on it.

During the alleged boycott years of 1984 through 1987, property/casualty insurance premiums and profits rose up to 300%.

The conduct alleged in the Complaints is beyond affirmative agreements and extends to concerted agreements and the implementation thereof to refuse to offer coverage. This conduct is within the boycott exception of the McCarran-Ferguson Act as interpreted in *Barry*, and as reflected in the legislative history. The McCarran-Ferguson Act exemption is lost under *Pireno* and *Royal Drug* when foreign reinsurers, who are not contemplated as in

the "business of insurance" under the McCarran-Ferguson Act, and who cannot be regulated by the states, combine with domestic insurers and reinsurers.

State officials could not and did not approve the alleged boycott activity, thereby precluding any McCarran-Ferguson Act exemption, even if such were available.

Extraterritorial jurisdiction is proper under the teachings of *Alcoa*, *Continental Ore*, and *Matsushita*. The FTAIA codified such concepts.

Comity does not preclude jurisdiction over the foreign reinsurers under the teachings of *Timberlane I*, *Mannington Mills*, or the Restatement (Third) of the Foreign Relations Law of the United States.

United Kingdom law and policy allow self-regulation of the insurance industry in the United Kingdom, and exempt the conduct alleged in the Complaints from its antitrust laws. Regulation of the insurance industry for the conduct alleged in the Complaints has been effectively abandoned.

The Treaty of Rome, which controls the European Community, of which the United Kingdom is a part, precludes conduct like that alleged in the Complaints, as demonstrated in the *Wood Pulp* case.

The Sherman Act and the Treaty of Rome form an "international customary law" based upon legislation and practice prohibiting the conduct alleged in the Complaints.

The balancing of the factors in *Timberlane I* and *Mannington Mills* demonstrates that jurisdiction should

extend to the foreign reinsurers and their activities alleged in the Complaints.

ARGUMENT

I. THE INSURANCE INDUSTRY HAS A SIGNIFICANT IMPACT UPON BUSINESSES AND CONSUMERS IN THE UNITED STATES

The insurance business today is a worldwide enterprise consisting of intertwined businesses and individuals located in different countries. Decisions made in New York, London or Tokyo affect people and enterprises from outer space to the riot-torn areas of South Central Los Angeles.

A. The Assets Of The Insurance Industry Are In The Trillions Of Dollars And The Premiums Are In The Hundreds Of Billions Of Dollars Annually[2]

The insurance industry in the United States is divided into two broad categories: Property/Casualty Insurance and Life and Health Insurance.

The insurance industry has responsibility for assets which at the end of 1991 totalled more than $2.15 trillion. The property/casualty category, itself, is responsible for

---

[2] Published and other materials not in the Record will be referred to herein under the "Brandeis Brief" concept. *Muller v. Oregon*, 208 U.S. 412, 421 (1908), in which the Court stated, "We take judicial cognizance of all matters of general knowledge."

assets which, at the close of 1991, totalled more than $601 billion.

Total premium receipts for 1991 were approximately $663.6 billion. Premium receipts for 1991 were nearly $223 billion for the property/casualty category, and $202.9 billion for the life insurance premiums and annuity considerations category. Premium receipts for the health insurance category for 1990 (the latest year for which data are available) were $237.7 billion[3].

The operating results for 1991 for property/casualty insurers show "net premiums" of $222,991,188,000 (approximately $223 billion); "premiums earned" of $222,150,735,000 (approximately $222 billion); "losses and loss adjustment expenses" incurred of $180,209,950,000 (approximately $180.2 billion) for a "loss and loss adjustment ratio" of 81.12%; "net investment income" of $34,246,720,000 (approximately $34.2 billion); "operating earnings after taxes" of $10,402,449,000 (approximately $10.4 billion); and "dividends" to stockholders of $5,758,007,000 (approximately $5.76 billion)[4].

The combined income of premium receipts and net investment income for 1991 was approximately $697.8 billion (or $.6978 trillion).

---

[3] Insurance Information Institute ("III"), *The Fact Book 1993 Property/Casualty Insurance Facts*, 1993, ("III Fact Book 1993") p.5.

[4] *Id.*, inside cover, referencing A.M. Best, *Best's Aggregates & Averages Property-Casualty*, 1992.

B. The Annual Premiums In The Insurance Industry Are Approximately Four Times Greater Than The Annual Retail Sales Of New Automobiles

The retail sales of new automobiles in the United States, for the year 1990, was estimated to be approximately $147.838 billion[5].

A comparison of the retail sales of new automobiles of $147.838 billion to the insurance industry premium receipts of approximately $663.6 billion shows the insurance industry premiums to be over 400% greater than the retail sales of new automobiles.

C. A Comparison Of Total Insurance Industry Premiums To The United States Gross Domestic Product, Number Of Businesses, And Population Shows Each Business And Individual Being Accountable For $108,000 And $2,700, Respectively

In 1990, the gross domestic product ("GDP") of the United States was approximately $5.522 trillion, and in 1991, approximately $5.677 trillion[6].

---

[5] Estimate was made by J.D. Power & Associates, a marketing information company which follows and is used by the automobile industry. The estimate was made by reference to *Automotive News, 1991 Market Data Book*, May 29, 1991, pp. 19-27, which contains statistics as to the number of automobiles sold in the United States for the year 1990. The average price of the automobile was determined to be $14,500, and this price was multiplied times the number of automobiles sold to obtain the estimate.

[6] United States Department of Commerce, Bureau of the Census, Bureau of Economic Analyses, Survey of Current Business, 1991.

A comparison of the $663.6 billion in insurance premiums with the GDP of 1990 and 1991 shows that the insurance premiums account for approximately 12% of the GDP in each year.

The population of the United States in 1990 was 248,709,873[7]. The number of businesses in the United States in 1989 (the last reported figure) was 6,107,413[8].

Using these figures as a basis, it may be determined that for all insurance premium income in 1991, each business in the United States accounted for an average of $108,500.00, in premiums and each man, woman and child in the United States accounted for an average of $2,700.00 in premiums.

For the category of property/casualty insurance premium income, the corresponding numbers would be approximately $35,000.00 for each business, and approximately $900.00 for each man, woman and child.

II. THE FACTS AND THE ALLEGATIONS OF THE COMPLAINTS DEMONSTRATE VIOLATIONS OF THE SHERMAN ACT

The undisputed facts were set out by the District Court in *In Re Insurance Antitrust Litigation*, 723 F.Supp. 464, 468-70 (N.D. Cal. 1989) and summarized by the

---

[7] United States Department of Commerce, Bureau of the Census, United States Census Population and Housing, 1990.

[8] United States Department of Commerce, Bureau of the Census, County Business Patterns, 1989.

Court of Appeals in *In Re Insurance Antitrust Litigation*, 938 F.2d 919, 922-925 (9th Cir. 1991).

The State of California Complaint and the State of Connecticut Complaint, filed after the California Complaint, are representative of Complaints filed by the various states and private plaintiffs.

The State of California Complaint alleges eleven claims for relief; eight claims allege violations of Section 1 of the Sherman Act (15 U.S.C. § 1) ("Sherman Act") and the remainder allege violations of state law.[9]

---

[9] The First Claim For Relief alleges a domestic conspiracy of primary insurers, the Reinsurance Association of America ("RAA"), a trade association of domestic reinsurers providing reinsurance on risks throughout the United States, and members of the RAA to coerce ISO to adopt restrictive terms and conditions in its CGL forms. The market is reinsurance coverage of CGL risks and the market for primary coverage of CGL risks. Cal. Compl. ¶ 112, Joint Appendix ("JA") 36. The alleged terms of the conspira[illegible] are set out at Cal. Compl. ¶ 113, JA 36. The alleged acts are set out at Cal. Compl. ¶ 114, JA 36-37. The alleged effects are set out at Cal. Compl. ¶ 115, JA 37.

The Second Claim For Relief alleges a foreign conspiracy of Lloyd's of London reinsurers and primary insurers to coerce ISO to adopt restrictive terms and conditions in its CGL forms. The markets are reinsurance coverage of CGL risks and the market for primary coverage of CGL risks. Cal. Compl. ¶ 117, JA 38. The operative paragraphs contain the same allegations as Cal. Compl. ¶¶ 113, 114 and 115. Cal. Compl. ¶¶ 118, 119 and 120, JA 38-39.

The Third Claim For Relief alleges a joint conspiracy of primary insurers, RAA members and Lloyd's of London reinsurers to coerce ISO to adopt restrictive terms and conditions in its CGL forms. The markets are reinsurance coverage of CGL risks and the market for primary coverage of CGL risks. Cal. Compl. ¶ 122, JA 39 and 40. The operative paragraphs contain

The State of Connecticut Complaint alleges seven claims for relief; six claims allege violations of the Sherman

---

the same allegations as Cal. Compl. ¶¶ 113, 114 (with ¶ 114(a) adding the words "and jointly communicating those terms to the ISO Executive Committee on September 20, 1984") and 115. Cal. Compl. ¶¶ 123, 124, 125, JA 40-41.

The Fourth Claim For Relief alleges a conspiracy of ISO, primary insurers, RAA members and Lloyd's of London reinsurers to standardize the terms and conditions of CGL insurance coverage. The markets are reinsurance coverage of CGL risks and the market for primary coverage of CGL risks. Cal. Compl. ¶ 127, JA 41. The alleged terms of the conspiracy are set out at Cal. Compl. ¶ 128, JA 41-42. The alleged acts are set out at Cal. Compl. ¶ 129, JA 42. The alleged effects are Cal. Compl. ¶ 130, JA 42-43.

The Fifth Claim For Relief alleges a conspiracy of Lloyd's of London reinsurers to coerce primary insurers to only offer coverage on a claims-made basis. The markets are reinsurance coverage of CGL risks written on the occurrence form and the market for primary coverage of CGL risks on the occurrence form. Cal. Compl. ¶ 132, JA 43. The alleged terms of the conspiracy are set out at Cal. Compl. ¶ 133, JA 43. The alleged acts are set out at Cal. Compl. ¶ 134, JA 44. The alleged effects are set out at Cal. Compl. ¶ 135, JA 44.

The Sixth Claim For Relief alleges a conspiracy of Lloyd's of London reinsurers to boycott pollution coverage. (Pollution Boycott I). The markets are casualty reinsurance coverage for pollution risks and the market for primary casualty coverage of pollution risks. Cal. Compl. ¶ 137, JA 45. The alleged terms of the conspiracy are set out at Cal. Compl. ¶ 138, JA 45. The alleged acts are set out at Cal. Compl. ¶ 139, JA 45-46. The alleged effects are set out at Cal. Compl. ¶ 140, JA 46.

The Seventh Claim For Relief alleges a conspiracy by ISO, reinsurers and primary insurers to restrain trade in the commercial umbrella and excess insurance markets. The market is commercial umbrella and excess insurance coverages. Cal. Compl. ¶ 142, JA 46. The alleged terms of the conspiracy are set out at Cal. Compl. ¶ 143, JA 47. The alleged acts are set out at Cal.

Act and the seventh alleges violations of the Connecticut Antitrust Act.[10]

III. DURING THE ALLEGED BOYCOTT YEARS OF 1984 THROUGH 1987, PROPERTY/CASUALTY INSURANCE PREMIUMS AND PROFITS ROSE UP TO APPROXIMATELY 300%

Statistics now available from insurance industry sources indicate a coincidental rise in premiums paid and

---

Compl. ¶ 144, JA 47. The alleged effect is set out at Cal. Compl. ¶ 145, JA 47.

The Eighth Claim For Relief alleges Lloyd's of London's, London Company Market's and a reinsurer's boycott of property pollution coverages. (Pollution Boycott II). The market is property insurance coverages for seepage, pollution and contamination exposures situated in North America, including the State of California. Cal. Compl. ¶ 147, JA 48. The alleged terms of conspiracy are set out at Cal. Compl. ¶ 148, JA 48. The alleged acts are set out at Cal. Compl. ¶ 149, JA 48. The alleged effects are set out at Cal. Compl. ¶ 150, JA 49.

The Ninth through Eleventh Claims For Relief allege violations of the California Business & Professions Code § 16700 *et seq.*, the Unfair Insurance Trade Practices Act, California Insurance Code § 790 *et seq.* and the California Business & Professions Code § 17200 *et seq.*, respectively. Cal. Compl. ¶¶ 151-156, JA pp. 49-50.

[10] The State of Connecticut Complaint contains substantial overlap with the California Complaint. The Connecticut Complaint alleges in its First Claim For Relief a conspiracy among all the defendants in the market for CGL property/casualty risks and for reinsurance and retrocessional insurance in connection therewith for the purpose of reducing financial exposures of such risks and increasing underwriting profits therefrom through the use of boycotts, coercion and intimidation. Conn. Compl., JA 88-90.

insurance industry profits during the years of the alleged boycotts.

A. From 1983 To 1987 General Liability Premiums Written Rose From Approximately $5.7 Billion To Approximately $20.9 Billion And Commercial Multiple Peril Premiums (Excluding Automobiles) Rose From Approximately $7.2 Billion To $17.2 Billion

CGL insurance falls within the category of property and casualty insurance. In 1986, according to the Complaints, CGL insurance premiums in the United States were $24.1 billion.[11]

During the years 1982 through 1991, general liability insurance[12] premiums written in billions of dollars and annual percentage changes and "line of business of" commercial multiple peril insurance, excluding automobiles, net premiums written and earned in billions of dollars were as follows:

[11] Cal. Compl. ¶ 47, JA 21; Conn. Compl. ¶ 39, JA 71.

[12] Coverage that pertains, for the most part, to claims arising out of the insured's liability for injuries or damage caused by ownership of property, manufacturing operations, contracting operations, sale or distribution of products, the operation of machinery; excluding injuries or damages in automobile accidents. III Fact Book 1993, pp. 28 and 110.

General Liability[13]

Year	Prems. Written ($1,000)	Annual Percent Change
1982	$ 5,668,459	-6.2
1983	**5,679,295**	**+ 0.2**
1984	**6,479,268**	**+14.1**
1985	**11,544,152**	**+78.2**
1986	**19,364,658**	**+67.7**
1987	**20,873,777**	**+ 7.8**
1988	19,077,182	- 8.6
1989	18,434,466	- 3.4
1990	18,123,123	- 1.7
1991	16,851,155	- 7.0

Commercial Multiple Peril[14]

Year	Net Prems. Written ($1,000)	Net Prems. Earned ($1,000)
1982	$ 7,009,385	$ 6,925,255
1983	**7,292,720**	**7,201,093**
1984	**8,286,962**	**7,875,565**
1985	**12,096,578**	**10,309,885**
1986	**16,190,282**	**14,618,481**
1987	**17,230,885**	**16,814,702**
1988	17,656,728	17,456,416
1989	17,468,204	17,402,226
1990	17,708,945	17,625,751
1991	17,031,833	17,187,177

[13] *Id.* p. 28 referring to A.M. Best, *Best's Aggregates & Averages Property-Casualty*, 1992.

[14] A.M. Best, *Best's Aggregates & Averages Property-Casualty*, 1992, p. 148

B. From 1985 Through 1987 The Insurance Companies' Total Profit As A Percent Of Net Premiums Earned Rose From 6.5 To 10.5, Return On Net Worth Rose From 9.7 To 18.4, Total Profit As A Percent Of Direct Premiums Earned Rose From 1.3 To 9.6, And Return On Net Worth Rose From 4.1 To 17.5

During approximately the same period of time, 1985 through 1990, the profits as a percentage of net premiums earned and the return on net worth of property/casualty insurance carriers for all lines of property/casualty insurance were as follows:[15]

TOTAL PROFIT AS PERCENT OF *NET* PREMIUMS EARNED

YEAR	PERCENT
1985	**6.5**
1986	**8.6**
1987	**10.5**
1988	8.7
1989	8.0
1990	7.4

RETURN ON NET WORTH

YEAR	PERCENT
1985	**9.7**
1986	**14.2**
1987	**18.4**
1988	13.4
1989	9.9
1990	9.2

[15] National Association of Insurance Commissioners, *Report on Profitability by Line by State 1990*, November 1991, Profitability Results by State by Line Six Year Summary 1985-1990 Charts.

TOTAL PROFIT AS A PERCENT OF *DIRECT* PREMIUMS EARNED

YEAR	PERCENT
1985	**1.3**
1986	**8.2**
1987	**9.6**
1988	8.9
1989	4.5
1990	5.9

RETURN ON NET WORTH

YEAR	PERCENT
1985	**4.1**
1986	**14.6**
1987	**17.5**
1988	14.4
1989	5.8
1990	8.1

IV. THE COMPLAINTS CLEARLY ALLEGE BOYCOTTS WHICH ARE NOT PROTECTED BY THE MCCARRAN-FERGUSON ACT

A. The Conduct Alleged In The Complaints Is Beyond Affirmative Agreements And Extends To Concerted Agreements To Refuse To Offer Coverage And The Implementation Of Such

The facts and conduct alleged in the Complaints show conduct by defendants to boycott nonconforming insurers and acts of boycott and coercion.[16]

This Court has decided only one case regarding the scope of the boycott exception to the McCarran-Ferguson

[16] *In Re Insurance Antitrust Litigation*, 938 F.2d at 928-929 and 930.

Act ("McCarran-Ferguson"):[17] *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978) ("*Barry*").

In *Barry*, the Court, at pages 546-550, specifically referred to the practices termed "boycotts" and "other types of coercion and intimidation" discussed in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944),[18] which were held to be nonexempt under McCarran-Ferguson, and extended such position by holding "the term boycott is not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group . . . ."[19]

The Court specifically stated the interpretation of the boycott exception at 438 U.S. 549-550.[20] The dissenters in *Barry* also concluded, at page 565, that conduct such as

---

[17] 15 U.S.C. §§ 1011 *et seq.*

[18] These involved primary insurers conspiring with reinsurers to deny reinsurance to competing primary insurers until they agreed to the conspirators' terms and joined the conspiracy.

[19] The Court stated at page 544 as follows: "Whatever other characterizations are possible, [Footnote] petitioners' conduct fairly may be viewed as an 'organized boycott,' . . . The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott . . . ."

[20] "The rules and regulations of private associations in the industry, while providing Senator O'Mahoney with a vivid example of 'the sort of agreement which ought to be condemned,' *ibid*, exemplified a larger evil – *'regulation by private combinations and groups,' id.*, at 1483 – that required the continued application of the Sherman Act.[Footnote]. . . . "

alleged in the Complaints, was within the boycott exception of McCarran-Ferguson.

The conduct alleged in the Complaints not only encompasses boycotts by insurance companies of "non-cooperating insurance companies", but also encompasses conduct to change the insurance industry by "private regulation" without state approval or regulation.

B. The Legislative History Of McCarran-Ferguson Indicates That The Act Would Not Protect Sherman Act Type Boycotts

The Court in *Barry* engaged in an extensive analysis of the legislative history of McCarran-Ferguson, concluding at 438 U.S. 541 that the term "boycott" should be interpreted in accordance with the tradition of the Sherman Act. The Court gave various examples of boycotts under the Sherman Act which included conditional concerted refusals to deal, as well as absolute refusals to deal, at pages 543 and 544, in addition to the reliance upon *South-Eastern Underwriters*, which itself contained a conditional refusal to deal.

"The language of § 3(b) is broad and unqualified; it covers 'any' act or agreement amounting to a 'boycott, coercion or intimidation.' If Congress had intended to limit its scope to boycotts of competing insurance companies or agents, and to preclude all Sherman Act protection for policyholders, it is not unreasonable to assume that it would have made this explicit. While the legislative history does not point unambiguously to the answer, it provides no substantial support for limiting language that Congress itself chose not to limit. [Footnote] (emphasis added)."

In essence, the Court in *Barry*, at page 549, adopted the position, as set forth by Senator O'Mahoney at 91 Cong. Rec. 1486 (1945), that the legislative history indicated that "combinations or agreements among the companies in the public interest, provided those combinations were in the open and approved by law," and if publicly supervised would be exempt, while "every effective combination or agreement to carry out a program against the public interest . . . would be prohibited."

V. THE MCCARRAN-FERGUSON EXEMPTION IS LOST WHEN INSURERS COMBINE WITH NON-EXEMPT PARTIES[21]

In *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979) (*"Royal Drug"*), this Court reiterated the principle "that exemptions from the antitrust laws are to be narrowly construed" (at page 232) and held that agreements between an insurer and retail pharmacies are not exempt from the antitrust laws.

---

[21] McCarran-Ferguson provides that "no act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business unless such act specifically relates to the business of insurance provided that . . . the Sherman Act . . . the Clayton Act, and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law." 15 U.S.C. § 1012(b) (1988). "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." *Id.* § 1013(b).

An analogy exists as to the foreign insurer defendants here. The pharmacies were not in the "business of underwriting insurance" and, therefore, outside of the intended regulation of the states by the nature of their actions with the insurers, but within the territory and jurisdiction of the states.

The "foreign reinsurers" are in reinsurance, and excess and surplus lines of insurance which are not regulated by the states and are located outside the territory of the states, and, therefore, are outside the intended regulation of the states.

The states cannot regulate beyond their borders.[22]

Although it may be argued that reinsurance is part of the "business of insurance", nothing in McCarran-Ferguson extends the "business of insurance" to entities which cannot be regulated by the states.

In essence, the Petitioners are attempting to *extend* the McCarran-Ferguson exemption to conduct between the regulated business of insurance and the non-regulated business of "foreign reinsurers".

Petitioners rely on the case of *Union Labor Life Ins. Co. v. Pireno* 458 U.S. 119 (1982) (*"Pireno"*), in which the court held that a health insurer's use of a professional association's peer review committee to render an opinion on the

---

[22] See *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 81 (1938) and *Brief for the United States As Amicus Curiae*, filed August 2, 1992, pp. 7-8, Footnote 5, referring to the legislative history of McCarran-Ferguson recognizing the limitation on state regulatory authority (91 Cong. Rec. 1442 (1945) Statement of Senator McCarran).

necessity for treatments and reasonableness of charges did not constitute the "business of insurance" under McCarran-Ferguson.

Pireno, however, is not supportive of Petitioners' position.[23]

With *Pireno* as guidance, *Royal Drug* may be viewed to determine if agreements with foreign reinsurers, *which also do not involve ratemaking*, may be considered exempt under McCarran-Ferguson. This Court, in *Royal Drug*, did not view such agreements, even if considered part of the insurance business, to be exempt.[24]

---

[23] In *Pireno*, this Court stated as follows, in referring to the business of insurance, at page 134: "We may assume that the challenged peer review practices need not be denied the § 2(b) exemption *solely* because they involve parties outside the insurance industry. But the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis. As the Court noted there, § 2(b) was intended primarily to protect "*intra*-industry cooperation" in the underwriting of risks. 440 U.S., at 221, 99 S.Ct., at 1078 (emphasis added). Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in non-insurance markets."

[24] The Court stated, at pages 221 through 225, as follows: It is true that § 2(b) of the Act does create a partial exemption from those laws. *Perhaps more significantly, however, that section, and the Act as a whole, embody a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws* – a concept that had prevailed before the *South-Eastern Underwriters* decision (emphasis added).

* * *

The actions alleged in the Complaints have nothing to do with ratemaking; nor are they consistent with the "intra-industry" actions contemplated by Congress. Based upon *Royal Drug* and *Pireno* the McCarran-Ferguson exemption should not extend to the conduct between the domestic defendants and foreign reinsurers.

VI. STATE OFFICIALS COULD NOT, AND DID NOT, APPROVE THE ALLEGED BOYCOTT ACTIVITY THEREBY PRECLUDING ANY MCCARRAN-FERGUSON EXEMPTION

Although an argument might be made that active state supervision of such boycott activities alleged by the Complaints are exempt, the absence of such supervision

---

The primary concern of both representatives of the insurance industry and the Congress was that *cooperative ratemaking efforts be exempt from the antitrust laws* (emphasis added).

* * *

The consistent theme of the remarks of other Senators also indicated a primary concern that cooperative ratemaking would be protected from the antitrust laws. Id., at 1444 and 1485 (remarks of Sen. O'Mahoney); 485 (remarks of Sen. Taft). *President Roosevelt, in signing the bill, also emphasized that the bill would allow cooperative rate regulation. He stated that "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States."* S. Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt, 1944-45 Vol., p. 587 (1950) (emphasis added).

should mandate that the activities should not be exempt.[25]

Even if the McCarran-Ferguson exemption would not be lost, none of the states ever approved or, for that matter, considered, supervised or regulated the alleged reinsurance boycotts.

VII. EXTRATERRITORIAL JURISDICTION IS PROPER IN THIS CASE

The Complaints allege conduct by the foreign reinsurers (including retrocessional reinsurers) to combine and conspire to affect the United States market, acts taken in furtherance of such combinations and conspiracies, and effects upon the United States market.

In *United States v. Aluminum Company of America*, 148 F.2d 416, 443-445 (2d Cir. 1945) ("*Alcoa*"), the doctrine of United States jurisdiction over conduct abroad which was intended to affect the United States market and did have such an effect was developed.[26] Subsequent to *Alcoa*, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), ("*Continental Ore*") this Court held that a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the

---

[25] See *FTC v. Ticor Ins. Co.*, 112 S.Ct. 2169, 2178-2179 (1992), which discusses immunity from the Sherman Act based upon state action.

[26] In *Alcoa*, the Court held that an agreement made abroad between a Canadian corporation and other foreign corporations limiting the importation of aluminum into the United States was unlawful under the Sherman Act if it is intended to affect United States imports and does have an effect on them.

reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.[27]

These concepts were reaffirmed by this Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("*Matsushita*"), footnote six at page 582, in which the Court reaffirmed *Continental Ore*, and stated, "[t]he Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce . . . ."

The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, added a new section 7 to the Sherman Act to establish that the Sherman Act does not apply to export or non-import foreign commerce unless the conduct involved has a direct, substantial, and reasonable foreseeable effect on domestic or import commerce, or export commerce.

Comparing the FTAIA to the concepts of *Alcoa*, *Continental Ore*, and later *Matsushita*, it may be determined that the FTAIA embodied the case law and codified such to employ a standard of "a direct, substantial and reasonably foreseeable effect" on United States commerce. Using this standard, the Court of Appeals was correct in its statement: "It is only in an unusual case that comity will require abstention from the exercise of jurisdiction".[28]

Based upon the allegations in the Complaints, jurisdiction over the foreign reinsurers exists. The specific

---

[27] 370 U.S. at 704.

[28] *In re Insurance Antitrust Litigation* 938 F.2d at 932.

allegations of the Complaints referred to a boycott in the U.S. market, even as such allegations relate to the excess and umbrella markets.[29]

VIII. COMITY DOES NOT PRECLUDE JURISDICTION OVER THE FOREIGN REINSURERS

In *Timberlane Lumber Co. v. Bank of America*, 549 F. 2d 597 (9th Cir. 1976) (*Timberlane I*) ("*Timberlane*"), the Court set out various factors to determine whether extraterritorial jurisdiction should occur.[30]

In *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) ("*Mannington Mills*"), the Court set forth another set of factors similar to *Timberlane* and added new factors.[31]

The American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (1987) ("Restatement Third") set forth guidelines in sections 402 and 403 for the exercise of jurisdiction similar to those in

---

[29] See Footnote 7, page 9, of the *Brief for the United States as Amicus Curiae*, which adopts this position.

[30] The Court reviewed the effects doctrine and concluded at 549 F.2d page 613 that "[a] tripartite analysis seems to be indicated." The third part of such analysis is "the additional question which is unique to the international setting of whether the interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Id*, 613.

[31] These are whether an order for relief would be acceptable in the United States if made by the foreign nation under similar circumstances and whether a treaty with the affected nations has addressed the issue. 595 F. 2d at 1297-1298.

Timberlane and *Mannington Mills*. Section 403(3) provides where two states are in conflict, after each state evaluates its own and the other state's interest in exercising jurisdiction, "a state should defer to the other state if that state's interest is clearly greater".

The Court of Appeals found all factors in favor of the exercise of jurisdiction except the first, "the degree of conflict with foreign law or policy".[32]

A. United Kingdom Law And Policy Does Not Directly Conflict With American Law And Policy So As To Override The Other Factors

Although the Court of Appeals found a conflict between United Kingdom ("U.K.") law and policy and American law and policy, such conflict is only superficial.

The Amicus Brief of the Government of the United Kingdom of Great Britain and Northern Ireland in Support of Petitioners ("U.K. Brief") sets forth the regulatory structure of the U.K. at pages 10-14. In referring to the Insurance Companies Act of 1982 and the governing of Lloyd's, the Brief admits at page 11 that "[t]he governing principle of the British Government's regulation of Lloyd's is that of self-regulation within the Lloyd's market, subject, of course, to the general laws set out above."

In referring to the Competition Act of 1980 ("Competition Act") and its regulatory effect, the U.K. Brief does

---

[32] The District Court found the factors in favor of the exercise of jurisdiction except the first, second, third, and fifth. It found the sixth factor to be neutral.

not mention that the anti-competitive practices controlled, dealt with and related to only "the production, supply or acquisition of goods in the U.K. or any part of it or supply or securing of services in the United Kingdom, or any part of it".[33] This law does not refer to activities within the United Kingdom which are intended to, and do, affect foreign markets.

Further, the Competition Act excludes orders under the Fair Trading Act 1973.[34] The Restrictive Trade Practices (Services) Order 1976[35] excluded persons covered by Part One of the Insurance Companies Act 1974 or Part Two of the Insurance Companies Act 1968.[36]

The Protection of Trading Interests Act 1980 specifically allows the U.K. to preclude enforcement of foreign judgments, such as treble damages.[37]

In essence, the regulatory scheme of the U.K. is not in substantive conflict with the Sherman Act except to the extent of multiple damages being imposed by a foreign court upon British citizens. However, even in this instance, United States courts have refused to allow comity to preclude the imposition of jurisdiction.[38]

---

[33] Competition Act 1980 § 2(1), JA 291.

[34] *Id.*, § 2(3), JA 292; Fair Trading Act 1973, JA 298-302.

[35] JA 258-263.

[36] *Id.*, § 8, JA 263. These exclusions were acknowledged in the U.K. Brief at page 12.

[37] JA 281-290.

[38] *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (CA D.C., 1984). International comity is generally discussed at pp. 937-945.

The self-regulation in the U.K. effectively means that the U.K. Government has abandoned regulation of the insurance industry with respect to the areas alleged in the Complaints, and has thereby created the "private regulation" which is not exempt from the Sherman Act by McCarran-Ferguson.

B. European Community Law Is In Accord With United States Law In Extending Extraterritorial Jurisdiction

The Treaty of Rome refers to competition "within the common market".[39] The Treaty of Rome prohibits the activity alleged in the Complaints.

In Case No. 89/85, *A. Ahlstrom Osakeyhtio v. Commission*, 1988 E.C.R. 5193, 4 C.M.L.R. 901-44, CCH Common Market Reporter Court Decisions ("Common Market Reporter"), Transfer Binder, Cases Reported 1987-1988, ¶ 14,491, page 18,595 (1988) ("Wood Pulp Case") the Court held that non-community wood pulp producers who intend to, and agree to, fix prices for sales within the community, and do fix such prices causing an effect in the community, fall within the meaning of Article 85 of the Treaty of Rome.[40] Some of the defendants were United States companies whose actions occurred outside of the

---

[39] JA 294 and implementing legislation for the U.K., JA 295.

[40] CCH Common Market Reporter, ¶ 14,491, page 18,611. The U.K. Brief at page 21 did not refer to this holding.

European Community ("Common Market") with implementation and effects within the Common Market.[41]

Under the Treaty of Rome, activities alleged in the Complaints, if done by non-Common Market members would be within the jurisdiction of Article 85 of the Treaty of Rome.

C. The Balancing Of The Factors Favors Jurisdiction

The Court of Appeals balanced the factors in favor of jurisdiction.

The U.K. does not regulate the conduct alleged in the Complaints. The self-regulation of the U.K. and the exemptions from its antitrust laws indicate that the U.K. has little or no interest in this conduct. The United States, on the other hand, has a significant interest in controlling such conduct.

The "additional factors" in *Mannington Mills* further warrant jurisdiction.[42]

---

[41] United States authorities did not raise any objection regarding any conflict of jurisdiction when consulted by the European Commission pursuant to the OECD Council Recommendation of October 25, 1979, concerning Cooperation between Member Countries on Restrictive Business Practices affecting International Trade. *Id.*, p. 18,612.

[42] An order for relief is acceptable in the United States if made by a foreign nation under similar circumstances, as is shown by the United States decision not to raise objections in the Common Market Wood Pulp Case.

An international customary law which reflects a practice among nations is composed of legislation and court decisions. And international customary law for antitrust jurisdiction has developed between the United States and the Common Market in that each entity, by its own laws and court decisions, extends jurisdiction to the activities alleged in the Complaints.

Given this international customary law and all of the other factors, jurisdiction should extend to the activities alleged in the Complaints.

CONCLUSION

The decision of the Court of Appeals should be affirmed. American businesses and consumers should not be subjected to boycotts and coercive conduct as alleged in the Complaints.

The conduct alleged in the Complaints is a manifestation of "private interests" controlling markets with the intent to affect those markets and causing a substantial effect on those markets.

The effect of this conduct is to increase the participants' income and profits up to 300% and higher, while requiring businesses and consumers to either pay higher premiums or be without insurance, while also reducing and eliminating coverage.

An international customary law has developed between the United States and Europe precluding these actions.

The U.K., a member of the Common Market, by its laws has not manifested any interest to oppose or replace this international customary law, nor has it manifested any significant interest to avoid these laws. In essence, the U.K. Petitioners wish to obtain the benefit of the Treaty of Rome when foreign companies intend to affect and cause an effect on the U.K. market, while allowing U.K. companies to intend to affect, and cause a substantial effect on foreign markets. This duality should not be allowed to exist, and is not allowed to exist under the present international customary law.

Petitioners wish to extend the McCarran-Ferguson exemption beyond its intent and purpose, and wish to extend the notions of comity to a point of emasculation of domestic law and international customary law. These proposed extensions are unwarranted and should be rejected.

Respectfully Submitted,

Richard I. Fine
Law Offices Of
Richard I. Fine & Associates
A Professional Corporation
10100 Santa Monica Boulevard
Suite 1000
Los Angeles, California 90067-4090
(310) 277-5833

Counsel for Amici Curiae